Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

RAFAEL ANTONIO FURCAL-PEGUERO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia State judiciary's interpretation of the legislative intent in enacting 40-6-392(a)(3), as interpreted via 40-5-55(b), is consistent with its obligation to avoid arbitrary and disparate treatment of non-English speaking citizens of the State of Georgia, thus through its erroneous interpretation deprives non-English speaking citizens of the constitutional guarantee of due process and equal protection.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The Georgia Court of Appeals rendered its opinion in this matter on May 21, 2002 and is reported at 255 Ga.App. 729, 566 S.E.2d 320, (2002) (App. A, *infra*, App. 1-App. 10). The order of the State Court of Cobb County is unreported.

JURISDICTION

The Supreme Court of Georgia denied the writ of certiorari on September 6, 2002 and denied the motion for reconsideration on September 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply and notification served on the Attorney General of the State of Georgia pursuant to Rule 29.4(c) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

The Fourteenth Amendment

28 U.S.C. § 1257(a)

28 U.S.C. § 2403(b)

Ga. Const., Art. 1, §1, Para. I

Ga. Const., Art. 1, §1, Para. II

O.C.G.A. § 40-5-55(b)

O.C.G.A. § 40-5-67.1

O.C.G.A. § 40-6-391(a)(1)

O.C.G.A. § 40-6-392(a)(3)

STATEMENT OF THE CASE

At issue in this Petition for Certiorari is the single question: Do police officers who are arresting a person who is incapable of communicating in English have ANY duty to communicate his implied consent rights in his native tongue by way of a readily available telephonic translation service for which the police subscribe and use on an "as needed" basis?

Petitioner is of Hispanic descent and is a non-English speaking United States citizen. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia. Cobb County police were called to a Kroger store parking lot in Mableton, Georgia by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call.

Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. DeSaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. The Cobb County police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia driver's license.

A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. However, the automobile was not running when the police arrived. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession.

Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the implied consent rights in English under O.C.G.A. §§ 40-5-55 and 40-5-67.1. The advisement takes one to two minutes to read in its entirety.

The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. The arresting officer read the rights only in English and only one time. Furthermore, the officer made no effort to obtain a Spanish

translation. Mr. Furcal-Peguero neither asked for nor was offered a translator. Mr. Furcal-Peguero ultimately did take the State's breath test.

The Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. Mr. Furcal-Peguero's first and "native language" is Spanish. Mr. Furcal-Peguero is a native of the Dominican Republic.

For approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical.

A. Proceedings Below

The State and the Petitioner, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant

to stipulated facts as outlined and aforementioned in the "Statement of the Case" section. It was the intention of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trial court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the State administered chemical breath test.

In exchange for the case being tried on stipulated facts and without a jury, the State agreed to proceed only on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation.

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." In the motion, the parties stipulated to the facts as being "controlling, complete and binding" in this case and the parties agreed, *inter alia*, that the breath test results were the *sine qua non* of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5).

Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical

test under Georgia's implied consent law, his right to obtain independent tests, etc. In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. It was also stipulated that at the time of Mr. Furcal-Peguero's arrest, Cobb County had subscribed to the Language Line service to implement the use of interpreters when needed.

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the State administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties, the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service.

Thereupon, a Notice of Appeal was filed on October 30, 2001. All State appellate procedures were exhausted and the Supreme Court of the State of Georgia denied Petitioner's Petition for a Writ of Certiorari via an order issued on September 6, 2002 as well as denying Petitioner's Motion for Reconsideration via an order dated September 27, 2002. Other than the license suspension, no conditions of his sentence, have been completed. Hence, Petitioner has standing to pursue this action on the grounds that not only has he suffered objective present harm, there is also the threat of specific future harm due to the potential for sweeping and improper applications of current Georgia law. ***U.S. Const. Amend XIV***. *See*, ***Bigelow v. Virginia***, 421 U.S. 809, 95 S.Ct. 2222 (1975); ***Gooding v. Wilson***, 405 U.S. 518, 92 S.Ct. 1103 (1972). *See also*, ***Campbell v. Louisiana***, 523 U.S. 392, 118 S.Ct. 1419 (1998); ***Adarand Constructors, Inc. v. Mineta***, 534 U.S. 103, 122 S.Ct. 511 (2001).

This Petition is properly and timely filed pursuant to U.S. Supreme Court Rule 13.

REASONS FOR GRANTING THE PETITION

I. Non-English speaking citizens can, in fact, "communicate", and are therefore on equal footing as all other citizens who can verbally communicate, therefore, to deny non-English speaking individuals the due process afforded to English speaking citizens on the basis that they cannot "communicate" denies them the equal protection of the laws afforded by the United States and Georgia Constitutions.

This case is subject to strict scrutiny review. ***Clark v. Jeter***, 486 U.S. 456, 108 S.Ct. 1910 (1988). Petitioner asks this Court to vindicate constitutional provisions designed to protect basic human rights. *See, e.g.,* ***Brown v. Board of Education,*** 347 U.S. 483, 74 S.Ct. 686 (1954). The constitutional provisions seeking to be vindicated are the rights to due process and equal protection of the laws that protect citizens' liberty interest and to not be deprived of that right without the due process of law. ***U.S. Const. Amend XIV.*** The term 'vested rights' means "interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice". ***Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources***, 266 Ga. 253, 466 S.E.2d 197 (1996). The Fifth Amendment to the United States Constitution guarantees to the States via the Fourteenth Amendment, that all individuals are entitled to due process before being deprived of the loss of liberty, as well as affording individuals the equal protection of the laws. Article 1, Section 1, Paragraph II of the Georgia Constitution (1983) also provides for the guarantee of equal protection of the laws.

The Due Process Clause of the U.S. Constitution requires that any deprivation of life, liberty or property be free from fundamental unfairness through governmental conduct that offends the community's sense of justice, decency and fair play. ***Moran v. Burbine***, 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-48 (1986). Due process of law is a summarized constitutional guarantee of respect for those personal immunities that are rooted in the traditions and conscience of our people so as to be classified as "fundamental". ***Rochin v. California***, 342 U.S. 265, 169, 72 S.Ct. 205 (1952). Georgia's Due Process Clause, ***Art. 1, Sec. 1, Par. I,*** mirrors the language of the Due Process Clause of the Fifth and Fourteenth Amendments. Similar provisions of the Georgia Constitution have been said to afford *greater* due process protection than does the federal Due Process Clause. ***Suber v. Bulloch County Bd. Of Ed.***, 722 F.Supp. 736 (S.D.Ga. 1989) (emphasis added).

Violation of equal protection can be found where a state judiciary's erroneous interpretation of legislative intent in wording of a statute infringes on a fundamental right. *See,* ***Bush v. Gore***, 531 U.S. 98, 121 S.Ct. 525 (2000). The touchstone of due process is protection of the individual against arbitrary action of government. ***Wolff v. McDonnell,*** 418 U.S. 539, 94 S.Ct. 2963 (1974). ***Mathews v. Eldridge***, 424 U.S. 319, 96 S.Ct. 893 (1976) developed the concept of "flexible due process" which requires a three-part test to determine how much process is due. The court must evaluate: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, *including the function involved and the*

fiscal and administrative burden that the additional or substitute procedural requirement would entail. . . . ***Id.*** (emphasis added).

In the instant matter, the judicial interpretation at issue pertains to that in the opinion of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986), a case where a non-English speaking defendant submitted to a State administered breath test after having been read his implied consent warnings. The trial court granted the defendant's motion to suppress because the State did not meet the burden of showing that the defendant was informed of his implied consent rights. ***Id.*** The Court of Appeals reversed and concluded that a non-English speaking defendant *is the same as an unconscious perso*n and that the inability of such an individual to communicate with the investigating officer results in the State administered test being admissible under O.C.G.A. § 40-6-392(a)(3). ***Id.*** (emphasis added). The inability to obtain an additional test should not preclude admission of the State administered test. ***Id.*** The Court of Appeals also declined to compel the State to read or seek to obtain translation of the implied consent advisements in any language but English. ***Id.*** Of significance is the basis of the ***Tosar*** reasoning which states:

> Pursuant to O.C.G.A. 40-5-55(b) "[a]ny person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the [implied consent to a chemical test to determine the alcohol or drug content of his blood] and the test or tests may be administered, subject to Code Section 40-6-392." Thus, the General Assembly recognized that there could be instances in which the suspect driver might be incapable of comprehending his rights when read to him. Obviously appellee

> was not dead or unconscious when he submitted to the intoximeter test. The State argues, however, that because of his inability to understand the officer who spoke only English, appellee falls into the category of "otherwise incapable of refusal." This contention has merit where the statute is read to mean that the inability to understand the rights read in English rendered the non-English speaking appellee's condition "the same as unconscious, i.e., in a noncommunicative condition." ***Id.***

Pursuant to Georgia law, the initial rule of statutory construction is to look to the legislative intent and to construe statutes to effectuate that intent. O.C.G.A. § 1-3-1(a). ***State v. Perkins***, ___ Ga.App. ___, ___ S.E.2d ___, 2002 WL 1492238 (2002). In construing a legislative act, a court must first look to the literal meaning of the act. ***Telecom USA, Inc. v. Collins***, 260 Ga. 362, 393 S.E.2d 235 (1990). If the language is plain and does not lead to any absurd or impracticable consequences, the court simply construes it according to its terms and conducts no further inquiry. ***Diefenderfer v. Pierce***, 260 Ga. 426, 396 S.E.2d 227 (1990). Further, statutes are to be construed in accordance with their real intent and meaning and not so strictly as to defeat their legislative purpose, ***Johnson v. Housing Auth. of Atlanta***, 198 Ga.App. 816, 403 S.E.2d 97 (1991), and statutory construction "must square with common sense and sound reasoning." ***Tuten v. City of Brunswick***, 262 Ga. 399, 418 S.E.2d 367 (1992).

The basic reading of the court's analysis in ***Tosar*** and its application in subsequent cases, is that it was the legislative intent to deny non-English speaking citizens a basic fundamental right. There is nothing in the legislative history that even remotely suggests a basis for this

holding. The interpretation by the judiciary is intentionally and blatantly discriminatory. The Georgia judiciary has refused to provide guidelines where if it cannot be ascertained whether or not an individual suspect can speak English, then the officer must at least *attempt* to find a translator or provide an interpreter. Non-English speaking citizens are in fact similarly situated to all citizens who can "communicate" whether it is in English, Spanish, French, sign language, etc., or otherwise. Albeit, the " . . . or otherwise in a condition rendering him incapable of refusal . . . " provision, when construed and read in context with the "dead, unconscious" provisions of the statute can be taken to mean that the legislature was only referring to the *physical conditions* of impairment that would render someone non-communicative or the simple *refusal* to speak by someone who is otherwise able to communicate. Not the status of the person in relation to the dialect spoken.

The Court of Appeals' statement in ***Tosar*** that it was not "basing its holding today upon 40-5-55(b)" is merely legal pretext. The Court basically engaged in an entire paragraph of analytical reasoning based on the fact that according to 40-5-55(b) as an example to justify its holding and then skirts the issue through a legal loophole. The ***Tosar*** opinion has basically reduced non-English speaking individuals to second class citizens

Moreover, just recently in ***Padron v. State***, 254 Ga.App. 265, 562 S.E.2d 244 (2002), the Georgia Court of Appeals reversed the conviction of two non-English speaking defendants because the state failed to establish that defendants understood the officer's request (at the roadway location of a traffic stop) to search the vehicle, and thus failed to establish that consent to search was freely

and voluntarily given. The court took note of the fact that *despite the availability* of departmental consent to search waiver forms printed in Spanish, the deputy did not opt to use one. ***Id.*** (emphasis added).

Only after arresting the defendants did the officer in ***Padron*** become concerned about their difficulty in understanding English, and he radioed ahead for an interpreter. ***Id.*** The ***Padron*** case evidences the fact that the Court recognizes that non-English speaking individuals can, in fact, communicate. This holding is in direct conflict with its holding in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

Furthermore, the ***Padron v. State***, 254 Ga.App. 265, 562 S.E.2d 244 (2002) case establishes that, by implication, if procedures and means exist for a police agency to translate advisements to non-English speaking individuals, via interpreters or written materials in an individual's primary language, then *there is a legal obligation to at least seek to utilize those resources*. Therefore, it is evident that in the instant matter the Georgia Supreme Court erroneously affirmed Petitioner's conviction on the basis of the ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986) decision, a case in which Language Line's instant availability was not an issue.

With regards to analyzing the logistics of instituting a process to afford translation services, the Georgia Supreme court in ***Rodriguez v. State***, 275 Ga. 283, 565 S.E.2d 458 (2002), stated: "The logistics of such a requirement would be extremely problematic in a society as pluralistic and diverse as the United States." To the contrary, the fact that Georgia and the United States is a diverse society is *exactly* why non-English speaking

citizens should be afforded at least the *opportunity*, if and when available, to be able to have the implied consent warnings read to them in a language they can understand. Again, with the advent of technology and the implementation of Language Line, such services make the "severe administrative costs" argument to justify the denial of due process a waning argument.

Here, the State's failure to provide an interpreter for the Petitioner violated the equal protection clauses of both the United States and the Georgia Constitutions because non-English speaking criminal defendants are similarly situated to those defendants who can "communicate" verbally in English or any other spoken dialect.[1]

It is clear from the record that Petitioner could not understand enough English to be able to communicate effectively with the officer. Furthermore, at the time that Petitioner was arrested and read the implied consent notice, it was clear that the Petitioner could not have

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[1] Indeed, although the legislature in O.C.G.A. § 50-3-100(a) has adopted English as the official language of the State, it further provides:

> (b) This Code section shall *not be construed in any way to deny a person's rights under the Constitution of Georgia or the Constitution of the United States or any laws, statutes, or regulations of the United States or of the State of Georgia as a result of that person's inability to communicate in the official language*;
>
> (d) The provisions of subsection (a) of this Code section shall not apply: (1) When in conflict with federal law;
>
> (2) When ... *justice* require[s] the use of other languages....

[emphasis added]

made a voluntary, intelligent and knowing decision on whether or not to take the State administered chemical test, to refuse the State administered chemical test or to request an additional, independent chemical test from qualified personnel of his own choosing, because there was no qualified person to translate the meaning of the notice for him in Spanish.

The State had the Language Line service immediately available, and could have easily provided Petitioner with a qualified interpreter. The officer was fully aware of the availability of the service, yet made no effort to utilize it. The five-sentence implied consent notice could have easily been interpreted at minimal effort and cost. The Petitioner should have had the equal protection of the law, and the denial of such also violated his right to due process of the law.

II. The Georgia judiciary's erroneous interpretation has the residual effect of discriminating on the basis of national origin.

The judiciary's erroneous interpretation does discriminate on the basis of national origin because those who cannot speak English or the spoken language are usually those of foreign descent. ***Sandoval v. Hagan***, 197 F.3d 484 (C.A. 11 Ala. 1999) *rev'd on other grounds* in ***Alexander v. Sandoval***, 532 U.S. 275, 121 S.Ct. 1511 (2001). However, the substance of the holding in ***Sandoval v. Hagan***, 197 F.3d 484 (C.A. 11 Ala. 1999) remains intact. Pursuant both ***Sandoval*** cases, Section 601 of Title VI of the Civil Rights Act of 1964 provides that no person shall, "on the ground of race, color, or national origin be excluded from participation in, *be denied the benefits of*, or be subjected to discrimination under any program or activity"

covered by Title VI. (emphasis added). The ***Sandoval*** court stated:

> Although the court looks to the policy's effect rather than solely to its terms, the court's finding that the English-only policy has an unjustified disparate impact on the basis of national origin is bolstered by the multitude of cases that find a strong nexus between language and national origin. Although no court has explicitly held that language is a proxy for national origin, in the equal protection context, the Supreme Court has recognized that language may serve as an adjunct for an immutable characteristic: 'It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.' ***Sandoval v. Hagan,*** 7 F.Supp.2d 1234 (1998) *rev'd on other grounds, quoting* ***Hernandes v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 1859 (1991).

Non-English speaking citizens are equal to English speaking citizens with regard to the ability to communicate and therefore fall within the "zone of interests" sought to be protected by Title VI. *See, e.g.,* ***Maryland State Conference of NAACP Branches v. Maryland Department of State Police***, 72 F.Supp.2d 560 (1999). By denying access to a qualified interpreter when available, the State is engaged in purposeful discrimination against non-English speaking citizens, thus discriminating on the basis of national origin. An English speaking citizen who is travelling abroad in a foreign country whose primary language is not English, is no less able to communicate than the rest of the citizens of that country. There is just a perceived language barrier.

Although, providing interpreter services across the country for defendants who may speak hundreds of different languages seems a hopelessly costly proposition for the American justice system due to the increase of the number of non-English speaking immigrants, this is not the case in Georgia as the Language Service is readily available and has in fact been authorized for use in judicial proceedings.[2]

In ***Tosar***, the court stated, "The State argues, however, that because of his inability to understand the officer who spoke only English, appellee falls into the category of 'otherwise incapable of refusal'. This contention has merit where the statute is read to mean that the inability to understand the rights read in English rendered the non-English speaking appellee's condition 'the same as unconscious, i.e., in a noncommunicative condition'." Quoting ***Smith v. State***, 143 Ga.App. 347, 238 S.E.2d 698 (1977). However in ***Tosar***, there was nothing in the record to show if appellee ever communicated to the officer that he could not speak English. Whereas here, during the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English.

The view expressed in ***Tosar***, is exactly analogous to the conditions of human plight that were fought to be

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[2] *See* Georgia Magistrate Court Rule 14. Language Line Service which provides, "The . . . Language Line Service is authorized for use in the magistrate courts whenever interpreting is needed in criminal and civil proceedings". [Adopted effective November 30, 1995.]

avoided as noted in ***Brown v. Board of Education***, i.e., the "exemption from legal discriminations, implying inferiority in civil society, lessening the security of [African-Americans] enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." Moreover, at the time ***Tosar*** was decided, *more than fifteen (15) years ago*, the issue was whether the State *should be compelled to print the implied consent rights* in Spanish or in as many different languages as the Georgia driver's license examination is given. (emphasis added). The Georgia Court of Appeals stated:

> To do so, we believe, would unreasonably burden law enforcement officers who would then be required to determine if the non-English speaking person spoke one of the languages of the pre-selected printed forms as well as determining if that person spoke one of the languages of the pre-selected printed forms as well as determining if that person could also read his spoken language. This we will not do. ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

However, this is no longer the case. Language Line *is* readily available and *was* readily available and instituted for use by the Cobb County Police Department. Life is not stagnant and neither should the law be, but should bend and yield to the ever changing needs of society and its citizens. *See, e.g.* ***Brown v. Board of Education***, 347 U.S. 483, 74 S.Ct. 686 (1954) (court would consider public education in light of its full development and present status throughout the nation, and not in light of conditions prevailing at time of adoption of the amendment). The implementation of the Language Line Service is not

burdensome or cost prohibitive as it is already instituted and widely used.

Also, because of the readily available services of Language Line, the reasoning in ***Tosar*** that there will be some danger in the deterioration of evidence because of the time consumed to try to obtain adequate interpretation services is also an obsolete concept:

> . . . [A]lcohol is assimilated into the bloodstream, reaching its cumulative peak concentration shortly after ingestion of the latest drink, and thence, without further ingestion, commences to dissipate from the blood at a constant and fairly rapid rate. The police investigator is often faced with the problem of preserving evidence of a crime which he believes upon reasonable grounds to have been committed . . .

This reasoning is obsolete because there would be no danger in the potential loss of evidence since the time it would take to call Language Line and have them read the two minute advisement in a language a suspect understands does not present an exigent circumstance warranting the denial of due process for a procedure which would take less than five minutes.

To establish national origin discrimination under Title VI, plaintiff must prove that he or she is member of ethnic minority, that he or she was denied participation in federally funded program because of his or her national origin, and that he or she is otherwise qualified to receive the benefit allegedly denied him or her. ***Atakpa v. Perimeter OB-GYN Associates, P.C.***, 912 F. Supp. 1566 (N.D. Ga. 1994). Having a language barrier is quite different from the ability to communicate/being non-communicative. Since Cobb County has implemented and

authorized the use of Language Line, Petitioner contends that he has been "denied the benefits of" a program covered by Title VI. If the Cobb County Department of Public Safety has implemented a program using Federal Government Funds for the use of the Language Line, however, do not require the use of that service in instances where 1) the suspect in question is attempting, but is unable to communicate with the officer in English, but speaks another non-English dialect and would benefit from the use of an interpreter; and 2) the police officer(s) is actually aware that it can be easily utilized, then the implementation of the program is a mere pretext to try to establish that it intends to advance constitutional guarantees and does not discriminate on the basis of national origin.

The United States is a nation that boasts of providing the greatest safeguards to personal liberties than any other country in the world. Non-English Speaking citizens have the same "legitimate expectations" of due process and equal protection guarantees as other citizens, as well they should. To allow the denial of the most fundamental principle of due process to citizens whose cultural background and/or national origin precludes English as their primary language, is to forget the most basic fundamental principles for which this nation was founded. The law cannot be static or inflexible, and when necessary should bend with the growth of the times and the availability and accessibility to programs, technology, etc., which protect and advance the most basic concepts of the Constitution. This is a time honored notion and was aptly stated by this Honorable Court in ***Hurtado v. People of State of Cal.***, 110 U.S. 516, 4 S.Ct. 111 (1884):

> Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the

common law . . . The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; *but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . .* ***Id.*** (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Georgia.
FURCAL-PEGUERO
v.
The STATE.
No. A02A0792.
May 21, 2002.
Reconsideration Denied June 12, 2002.
Certiorari Denied Sept. 6, 2002.

Defendant was convicted following bench trial on stipulated facts, in the State Court, Cobb County, McDuff, J., of driving under the influence (DUI). Defendant appealed. The Court of Appeals, Ellington, J., held that Spanish-speaking defendant consented to chemical intoxication tests administered by state. Affirmed.

ELLINGTON, Judge.

Following a bench trial on stipulated facts, the State Court of Cobb County convicted Rafael Antonio Furcal-Peguero of driving under the influence, O.C.G.A. § 40-6-391(a)(5). Furcal appeals, contending the trial court erred in denying his motion to suppress the result of a breath test. Finding no error, we affirm.

Before trial, the parties agreed that the arresting officer read Furcal the implied consent notice only in English, despite knowing that Furcal's native language was Spanish and that a telephonic translation service was immediately available. Furcal moved to suppress the result of the State-administered breath test on the basis that the implied consent notice was not conveyed to him as

required by law.[1] At trial, Furcal conceded the issue is controlled adversely to him by *State v. Tosar*, 180 Ga.App. 885, 888, 350 S.E. 2d 811 (1986), in which we held that the implied consent notice does not have to be translated into Spanish for a Spanish-speaking person. Furcal argued, however, that *State v. Tosar* should be overruled as unconstitutional or modified to address situations in which translation services are instantly available to the arresting officer. Reserving his challenge to the evidence of his blood alcohol concentration, Furcal stipulated to certain facts, including that he was driving with an unlawful blood alcohol level,[2] and submitted his case to the trial court for decision. The court found Furcal guilty, implicitly denying his motion to suppress under *State v. Tosar*.

Although the trial court and the parties characterized the proceeding below as a bench trial on stipulated facts, we are concerned that in many material respects the court and the parties considered the proceeding a conditional guilty plea, designed to preserve for appeal Furcal's legal challenge to *State v. Tosar*, 180 Ga.App. at 888, 350 S.E.

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[1] O.C.G.A. §§ 40-5-55(a)(consent to chemical test of blood, breath, or urine implied by act of driving a motor vehicle); 40-5-67.1(b) (script for implied consent notice); 40-6-392(a)(3) (right to independent test), (a)(4) (requirement that driver be advised of right to an independent test at time of arrest).

[2] When Furcal was arrested on June 10, 2000, a per se DUI violation under O.C.G.A. 40-6-391(a)(5) was defined as driving while having a blood alcohol concentration of 0.10 grams or more. See Ga. L. 1991, pp. 1886, 1891, 1896, § 6 (legal limit set at 0.10 for offenses after April 24, 1991); Ga. L. 2001, pp. 208, 214, 229, § 1-5 (legal limit reduced to 0.08 for offenses after July 1, 2001). The challenged breath test showed Furcal was driving with a blood alcohol concentration of 0.111 grams.

2d 811.[3] In *Hooten v. State*, 212 Ga.App. 770, 775(1), 442 S.E.2d 836(1994), we overruled *Mims v. State*, 201 Ga.App. 277, 279, 410 S.E. 2d 824 (1991), and disallowed the conditional guilty plea procedure. See *Barber v. State*, 231 Ga.App. 176(2), 498 S.E.2d 758 (1998); *Martin v. State*, 214 Ga.App. 388, 448 S.E. 2d 57 (1994). Ordinarily, a defendant waives any error in the denial of his motion to suppress by pleading guilty; therefore, viewing Furcal's conviction as arising from a guilty plea would preclude this Court from reviewing the denial of his motion to suppress. *Thompson v. State*, 240 Ga.App. 539, 540(2), 524 S.E.2d 239 (2000).

But Furcal expressly proceeded to trial on stipulated facts under the authority of *Richards v. State*, 269 Ga. 483, 500 S.E. 2d 581 (1998). Under *Richards v. State*, a defendant may stipulate to facts that would be demonstrated at trial (such as the result of a breath test) and may

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[3] For example, Furcal's attorney asked his client, "You understand you are entering a plea on one count of DUI? . . . Do you understand there is going to be a plea and from the plea we are going to appeal?" The defense attorney stated that he and the prosecutor worked for months on structuring the agreement. The State agreed to recommend a particular sentence and to enter nolle prosequi as to four other counts. See O.C.G.A. § 17-8-3. After hearing the parties' stipulated facts, the trial court asked, "Then I suppose with this stipulation it is agreed by the parties that the Court should find [Furcal] guilty and sentence him. Is that contemplated between the parties?" The defense attorney responded, "I think *[State v.] Tosar* compels you to do so, until it is overturned, doesn't it." After finding Furcal guilty, the trial court said, "[s]ince this is a bench trial on stipulated facts, it is recognized by the Court that the parties are stancing [sic] their case so that the Court of Appeals can have a fresh look at . . . *[State v.] Tosar*" The court then stated that it "accept[ed] [Furcal's] plea as freely[,] voluntarily and understandably entered."

acknowledge that the stipulated facts would support a conviction of the crime charged *on the condition* that he may challenge specified pretrial rulings on appeal (such as the denial of his motion to suppress the result of the breath test). *Id.* at 485-486, 500 S.E.2d 581. This procedure is particularly appropriate in this case, where the trial court was not required to resolve *any* disputed facts in ruling on the pretrial issues. *Cf. id* at 483-484, 500 S.E.2d 581 (trial court was required to resolve disputed facts regarding reading of implied consent notice in denying motion to suppress). Thus, based on *Richards v. State* we consider Furcal's legal challenge on the merits. We urge trial courts, however, not to blur the important distinctions between accepting a guilty plea and finding a defendant guilty following a bench trial.

Where the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, we review de novo the trial court's application of the law to undisputed facts. *Vansant v. State*, 264 Ga. 319, 320(1), 443 S.E.2d 474(1994). In five related enumerations, Furcal contends the trial court erred in allowing the evidence of his blood alcohol level, based on the following circumstances to which the State stipulated: (1) Furcal's native language is Spanish and his command of English is marginal; (2) Furcal carried a valid Georgia driver's license; (3) the State administers the driver's test to nonEnglish-speaking applicants in the native language of the applicant; (4) the arresting officer read the implied consent notice to Furcal only in English; (5) as a Cobb County employee, the arresting officer had telephonic access to translation services; (6) knowing Furcal was a Spanish speaker and knowing that a telephonic translation service was immediately available, the arresting

officer failed to have a translator relay the implied consent notice to Furcal in Spanish; (7) Furcal's ability to understand that he could refuse the breath test, that evidence of his refusal could be used against him, and that he had a right to an independent test would have been significantly greater if the implied consent notice had been read to him in Spanish; and (8) Furcal agreed to take a breath test. It is also undisputed that Furcal did not request a translator; nor did he request an independent test.

The General Assembly has declared as a matter of law that persons having an illegal blood alcohol concentration "*constitute*[ ] *a direct and immediate threat to the welfare and safety of the general public.*" (Emphasis supplied.) O.C.G.A. § 40-5-55(a). "Under the implied consent laws, every driver is deemed to have given his consent to a chemical test for alcohol content, subject only to the duty placed upon an officer to advise the testee that he is entitled to an independent test of his own choosing. Once that duty is fulfilled by the officer, the statutory obligation is satisfied." (Citations and punctuation omitted.) *State v. Webb*, 212 Ga.App. 872, 873, 443 S.E.2d 630 (1994). See O.C.G.A. § 40-5-55(a).[4] 40-5-67.1(b). O.C.G.A. § 40-5-67.1(b) requires the arresting officer to inform the person

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[4] O.C.G.A. § 40-5-55(a) provides in pertinent part:

> [A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for [DUI] or if such person is involved in any traffic accident resulting in serious injuries or fatalities.

who has been arrested of his right to an independent test and to inform him that his refusal to submit to State testing may be offered into evidence against him at trial. "O.C.G.A. § 40-5-67.1 thus allows the person to withdraw his implied consent by refusing to submit to testing." *Hernandez v. State*, 238 Ga.App.796, 798,(2), 520 S.E. 2d 698 (1999). O.C.G.A. § 40-5-55(b). provides that any person who is "dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn" his implied consent, thereby allowing the test or tests to be administered.

Furcal contends, inter alia, that *State v. Tosar* should be overruled or modified because nonEnglish-speaking drivers are denied equal protection of the law in comparison to hearing impaired drivers. O.C.G.A. § 24-9-100 et seq., requires police officers to request the assistance of a translator before interrogating a hearing impaired arrestee.[5] A written interrogation may proceed if a translator

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[5] In particular, O.C.G.A. § 24-9-103 provides:

(a) The arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof.

(b) (1) Except as provided in paragraph (2) of this subsection, the law enforcement agency shall immediately request a qualified interpreter from the department, and the department shall provide a qualified interpreter. No interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken until a qualified interpreter has been provided; and no answer, statement, admission, or other evidence acquired from the hearing impaired person shall be admissible in any criminal or quasi-criminal proceeding unless such was knowingly

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is not available within an hour. O.C.G.A. § 24-9-103(b)(2). This mandatory requirement extends to DUI arrests. See *Allen v. State*, 218 Ga. App. 844, 846-847, 463 S.E. 2d 522 (1995)(admission of result of State-administered test reversed due to officer's failure to request a qualified interpreter for a hearing impaired driver); *State v. Woody*, 215 Ga. App. 448, 450, 449 S.E.2d 615 (1994)(exclusion of result of State-administered test due to officer's failure to request a qualified interpreter for a hearing impaired driver affirmed).

While Georgia law requires a limited accommodation for this immutable physical disability, "a hearing impaired driver does not have greater rights and privileges than a hearing driver." *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E.2d 630. "[T]he laws requiring the presence of a qualified interpreter do not vitiate [the] implied consent" of a hearing impaired driver arrested for DUI. (Punctuation omitted.) *Id.* Because removing drunk drivers from our highways and roads is a critical public safety function, and because the level of alcohol or drugs in a person's blood, breath, or urine inevitably changes over time, police

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and voluntarily given through and in the presence of a qualified interpreter. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter. (2) If a qualified interpreter is not available one hour after the hearing impaired person has been taken into custody and a request has been forwarded to the department, the arresting officer may interrogate or take a statement from such person, provided that such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

officers must be able to initiate the evidence collection process without unreasonable delay. See O.C.G.A. §§ 40-5-55(a); 40-5-67.1; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E. 2d 811; *Smith v. State*, 143 Ga.App. 347, 349(1), 238 S.E.2d 698 (1977). As we emphasized in *State v. Webb* and in *State v. Tosar, all* drivers are entitled only to be *advised* of their rights under the implied consent law, that is, to have the implied consent notice read to them. *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E. 2d 630; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E. 2d 811. See *Snelling v. State*, 176 Ga. App. 192, 193(1), 335 S.E. 2d 475 (1985)(officer's testimony that he advised the driver of his implied consent rights is prima facie evidence of compliance). The law does not require the arresting officer to ensure that the driver *understands* the implied consent notice.[6] *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E.2d 630; *State v. Tosar*, 180 Ga. App. at 888, 350 S.E.2d 811.

The result of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent. O.C.G.A. § 40-5-55(a); 40-5-67.1; 40-6-392; *Snelling v. State*, 176

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[6] Furcal contends the trial court erred in finding that he "knowingly waived his right to additional testing" under O.C.G.A. § 40-6-392. The trial court, however, did *not* find that Furcal knowingly waived his right to additional testing. Further, the admissibility of a State-administered test is not conditioned on the State's showing of a knowing and intelligent waiver of the "right" to an independent test. *Cunningham v. State*, 255 Ga. 35, 38(6), 334 S.E.2d 656 (1985); *State v. Webb*, 212 Ga.App. at 873, 874-875, 443 S.E.2d 630; *State v. Tosar*, 180 Ga.App. at 887, 350 S.E.2d 811; *Snelling v. State*, 176 Ga.App. at 193-194(1), 335 S.E.2d 475.

Ga.App. at 193(1), 335 S.E.2d 475. See also *State v. Webb*, 212 Ga.App. at 873, 443 S.E. 2d 630; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E.2d 811.[7] The trial court did not err

[7] We note that in *State v. Tosar*, we accepted the State's argument that a nonEnglish-speaking driver is "noncommunicative," that is, "the same as unconscious," but we declined to base our holding that the State-administered test was admissible on O.C.G.A. § 40-5-55(b). 180 Ga.App. at 887, 350 S.E.2d 811. We reaffirm today (and agree with Furcal) that a nonEnglish-speaking driver is *not* "in a condition rendering such person incapable of refusal" for the purposes of O.C.G.A. § 40-5-55(b). See also *State v. Webb*, 212 Ga.App. at 874, 443 S.E. 2d 630(hearing impaired driver's inability to understand the officer did not constitute a withdrawal of his implied consent). This is an important distinction because, under O.C.G.A. § 40-5-55(b), a law enforcement officer is not required to advise a dead or unconscious driver, or a similarly noncommunicative driver, of his rights under the implied consent law before administering chemical tests. *Smith v. State*, 143 Ga.App. at 349(1), 238 S.E.2d 698(semi-conscious and noncommunicative). To the greatest extent possible, every driver suspected of DUI should be given the opportunity to exercise the choice of withdrawing his consent to testing (and suffering the evidentiary consequences) or submitting to the test and requesting an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver, even those seemingly incapable of understanding spoken English, may seem like a hollow formality, but it is not. Suppose an officer believes an apparently nonEnglish-speaking driver would not be able to understand the implied consent notice and so forgoes giving the notice. The driver might later claim he could have understood the notice and, if given the notice, he would have withdrawn his consent or requested an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver relieves those officers of the unreasonable burden of evaluating a driver's communication ability before testing his breath or blood.

We wish to clarify one aspect of *State v. Tosar*. In *State v. Tosar* we stated that the driver's "inability to communicate with the officer brings this case within the meaning of O.C.G.A. § 40-6-392(a)(3) . . . . Where the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, any failure to obtain an additional test is justifiable and the results of the state-administered

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in admitting the result of the State-administered breath test.

Judgment affirmed.

SMITH, P.J., and *ELDRIDGE*, J., concur.

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tests are admissible." 180 Ga.App. at 888, 350 S.E. 2d 811. As we noted in *Nelson v. State*, 135 Ga.App. 212, 213, 217 S.E. 2d 450(1975); however, "the state's justifiable failure or inability to obtain the additional test must logically be preceded by the [driver's] request for same." (Punctuation omitted.) See also *Smith v. State*, 250 Ga.App. 583, 586(1), 552 S.E.2d 528(2001); *State v. Vandervoort*, 215 Ga.App. 72, 73(1), 449 S.E. 2d 617(1994); *State v. Buffingon*, 189 Ga.App. 800,801-802, 377 S.E.2d 548(1989). Because Furcal did not request an independent test, O.C.G.A. 40-6-392(a)(3) has no application to the analysis of whether the result of the State-administered test is admissible.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 06, 2002

William C. Head
750 Hammond Drive
Building 5
Atlanta GA 30328

Case No. S02C1523

RAFAEL ANTONIO FURCAL-PEGUERO v. THE STATE

COURT OF APPEALS CASE NO. A02A0792

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

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_____

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_____

Sherie M. Welch, Clerk

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APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S02C1523 Atlanta, September 27, 2002

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

RAFAEL ANTONIO FURCAL-PEGUERO v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case it is so ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk

APPENDIX D

Fifth Amendment to the Constitution of The United States (in relevant part):

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Fourteenth Amendment to the Constitution of The United States (in relevant part):

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

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28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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28 U.S.C. § 2403(b):

> In any action, suit, or proceeding in a court of the United States to which a State or any

agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Ga. Const., Art. 1, §1, Para. I:

No person shall be deprived of life, liberty, or property except by due process of law.

Ga. Const., Art. 1, §1, Para. II:

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

O.C.G.A. § 40-5-55 Implied consent to chemical tests:

(a) The State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of *Code Section 40-6-391* constitutes a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or else-

where throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of *Code Section 40-6-391* or if such person is involved in any traffic accident resulting in serious injuries or fatalities. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of *Code Section 40-6-391*. The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities. Subject to *Code Section 40-6-392*, the requesting law enforcement officer shall designate which of the test or tests shall be administered, provided a blood test with drug screen may be administered to any person operating a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section *40-60-392*.

(c) As used in this Code section, the term "traffic accident resulting in serious injuries or

fatalities" means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness.

40-6-392 Chemical tests for alcohol or drugs in blood:

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of *Code Section 40-6-391*, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply: . . . (3) The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer;

Code of Georgia, Title 40, Chapter 5, Article 3:

40-5-67.1(b)(2) Implied consent notice for suspects age 21 or over:

Georgia law requires you to submit to state administered chemical tests of your

blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.10 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Code of Georgia, Title 40, Chapter 6, Article 15:

40-6-391(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

. . .

(5) The person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such

driving or being in actual physical control ended . . .

Supreme Court, U.S.
FILED
JAN 30 2003
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No. 02-987

In The

Supreme Court of the United States

RAFAEL ANTONIO FURCAL-PEGUERO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to consider Petitioner's equal protection claim and the related claim purportedly arising under the Civil Rights Act of 1964 when such claims were neither presented nor ruled upon by Georgia's appellate courts?

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PART I.

STATEMENT OF THE CASE

Petitioner was arrested for driving under the influence of alcohol on June 10, 2000, in Cobb County, Georgia. On October 30, 2001, Petitioner was convicted of driving under the influence of alcohol following a bench trial on stipulated facts in the State Court of Cobb County. Petitioner then filed a direct appeal with the Court of Appeals of Georgia which affirmed his conviction. *Furca-Peguero v. State*, 255 Ga. App. 729, 731 (May 21, 2002). Thereafter, Petitioner filed a petition for writ of certiorari with the Georgia Supreme Court which was denied. *Furcal-Peguero v. State*, No. S02C1523, 2002 Ga. LEXIS 708 (Sept. 6, 2002).

Petitioner is now seeking review of the Georgia Supreme Court's ruling denying his petition for writ of certiorari. As Petitioner failed to articulate the arguments posited to this Court in either of Georgia's appellate courts, a detailed statement of facts surrounding Petitioner's crime (which were previously stipulated to in his bench trial before the State Court of Cobb County) is unnecessary.

PART II.

REASONS FOR NOT GRANTING THE WRIT

THIS COURT SHOULD DECLINE TO GRANT REVIEW TO CONSIDER PETITIONER'S CLAIMS AS THEY WERE NEITHER RAISED NOR RULED UPON BY EITHER OF GEORGIA'S APPELLATE COURTS.

Petitioner asks this Court to grant certiorari to review his contention that non-English speaking persons arrested for driving under the influence of alcohol (DUI) in Georgia are entitled to have the state's implied consent warning read to them in their "primary" language. Specifically, Petitioner contends that under equal protection, he, a purported non-English speaking citizen of the State of Georgia, is "similarly-situated to those defendants who can 'communicate' verbally in English or any other spoken dialect." (Petition, p. 14).

Petitioner has never argued to the Georgia appellate courts that he is similarly-situated to English speaking DUI arrestees for equal protection purposes. To the contrary, beginning with his direct appeal to the Court of Appeals of Georgia, Petitioner argued that he was denied equal protection under the United States Constitution because he "is similarly-situated to hearing impaired persons" who are entitled to have the implied consent warning translated to them pursuant to O.C.G.A. § 24-9-103. (Respondent's App. A, App. 20-27). The Court of Appeals of Georgia rejected this specific claim. *Furcal-Peguero v. State*, 255 Ga. App. 729, 731 (2002). Thereafter, Petitioner filed an unsuccessful motion for reconsideration with the court of appeals, again urging that "a non-English speaking person is similarly situated with a hearing-impaired person." (Resp. App. B, App. 36-37).

Upon conclusion of his appeal to the Court of Appeals of Georgia, Petitioner sought a petition for writ of certiorari with the Georgia Supreme Court. Therein, Petitioner again argued for equal protection purposes that he was similarly-situated with a hearing-impaired person. (Resp. App. C, App. 43 (enumeration A), 50-59). This petition was denied. *Furcal-Peguero v. State*, No. S02C1523, 2002 Ga. LEXIS 708 (Ga. 2002).

Neither in the Court of Appeals of Georgia nor the Georgia Supreme Court did Petitioner ever argue that he is similarly-situated to English speaking persons. He now attempts to raise this argument for the first time before this Court.

Because Petitioner failed to raise this claim in the appellate courts of Georgia, this Court should deny the instant petition for certiorari as this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See Wilson v. Cook*, 327 U.S. 474, 483-484 (1946). Moreover, where the federal question presented was not raised in the state courts below, this Court has previously held that it is without jurisdiction to hear the case. *Webb v. Webb*, 451 U.S. 493 (1981).

Respondent suggests that the reason for Petitioner's substitution as to which group he is similarly-situated with is likely due to this Court's recent denial of certiorari to another Georgia DUI defendant. In *Rodriguez v. State*, 275 Ga. 283, 565 S.E.2d 458 (2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 624, 154 L. Ed. 2d 519 (Dec. 2, 2002), the petitioner sought review from this Court on the basis that under equal protection, he, a non-English speaking DUI defendant, was similarly-situated to a hearing-impaired

defendant, and therefore, O.C.G.A. § 24-9-103 was unconstitutional. Therein, Petitioner Rodriguez was represented by the same counsel now representing Petitioner Furcal-Peguero. Respondent suggests that perhaps Petitioner's substitution is an attempt to avoid the import of this Court's decision in *Rodriguez*. However, this change raises a claim not previously raised or considered by Petitioner in the Georgia appellate courts.

Likewise, to the extent Petitioner alleges that he has established national origin discrimination under Section 601 of Title VI of the Civil Rights Act of 1964, 28 U.S.C. § 2000d, this claim was never raised nor considered in the Georgia appellate courts.

For these reasons, the Court should decline to grant certiorari.

CONCLUSION

Wherefore, for all the foregoing reasons, Respondent prays that this Court decline to grant certiorari to review the decision of the Georgia Supreme Court denying Petitioner's application for a writ of certiorari.

Respectfully submitted,

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RESP. APPENDIX A

IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Case No. A02A0792

APPELLANT'S BRIEF

(Filed Dec. 31, 2001)

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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO, Appellant,	:	Case No.: A02A0792
v.	:	
STATE OF GEORGIA, Appellee.	:	

II. STATEMENT OF FACTS

In this case, the State and the Appellant, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant to stipulated facts. (R. at 233). It was the intentions of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trail court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the

state administered chemical breath test. (R. at 233, 238-43).

In exchange for the case being tried on stipulated facts and without a jury the State agreed to proceed only on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 233). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation. (R. at 233; T.[1] at 20).

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. 233, 238-43). In the motion, the parties stipulated to the following facts as being "controlling, complete and binding" in this case:

1. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia (R. at 234).

2. Cobb County police were called to a Kroger store parking log at 4455 Floyd Road, Mableton, Georgia, by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. (R. at 234). The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. (R. at 234).

---

[1] Hereinafter "T" refers to the transcript of the bench trial on stipulated facts held before the Honorable Robert E. McDuff on October 20, 2001 in the city of Marietta, Cobb County, Georgia.

The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call. (R. at 234).

3. Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. Desaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. (R. at 234). The Cobb County Police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia's driver's license. (R. at 234).

4. A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. (R. at 234). However, the automobile was not running when the police arrived. (R. at 24).

5. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession. (R. at 234).

6. Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence. (R. at 235).

7. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. (R. at 235). Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. (R. at 235).

8. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the following implied consent rights under O.C.G.A. §§ 40-5-55 and 40-5-67.1:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state will be suspended and, if you are convicted of having such an alcohol concentration, will be revoked. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine or other bodily substances at your own expense and from qualified personnel of your choosing. Will you submit to the state administered chemical tests of your BREATH under the implied consent law?

(R. at 235-36). The advisement takes one to two minutes to read in its entirety. (R. at 236).

9. The parties stipulated that the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. (R. at 236). Mr. Furcal-Peguero's first and "native language" is Spanish. (R. at 236). Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236).

10. Additionally, the parties stipulated that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37). Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. (R. at 237). Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

11. The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. (R. at 237). The arresting officer read the rights only in English and only one time. (R. at 237). Furthermore, the officer made no effort to obtain a Spanish translation. (R. at 237).

12. Mr. Furcal-Peguero neither asked for nor was offered a translator. (R. at 237). Mr. Furcal-Peguero ultimately did take the State's breath test. (R. at 237). The parties agreed that the breath test results were the *sine*

qua non of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 237).

13. Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical test under Georgia's implied consent law, his right to obtain independent tests, etc. (R. at 237). In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. (R. at 237).

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. at 238-43). The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant

seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties, the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986). (R. at 20).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (T. at 20). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. (T. at 24). Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service. (T. at 24).

PART II

I. ENUMERATION OF ERRORS

A. The trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal was informed of his implied consent rights in English only, without the benefit of a translation into Spanish and without any effort by

the arresting officer to obtain such a translation even though such a translation was readily available.

B. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Mr. Furcal-Peguero, who is similarly situated to hearing impaired persons, was denied equal protection under the State and Federal Constitution, when pursuant to O.C.G.A. §§ 24-9-100 through 24-9-103, 40-5-55(b), and 40-6-392(a)(3) the Appellant's disparate treatment as a language impaired or non-English speaking person is based on nationality, a suspect classification.

C. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Appellant's Due Process Rights under the federal and state constitutions were violated when the arresting officer failed to adequately advise the Appellant of his right to an independent test.

D. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because Appellant's rights against self-incrimination under the Fifth Amendment of the Constitution of the United States of America, Ga. Const. 1983, Art. I, Sec. I, Par. XVI, or O.C.G.A. § 24-9-20 were violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

E. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against unlawful search and seizure under the Fourth Amendment of the Constitution of the United States of America and Ga. Const. 1983, Art. I, Sec. I, Par. XIII were violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without being informed of his implied consent rights when the consent to take the test was not made knowingly or voluntarily.

II. STATEMENT OF JURISDICTION

Appellant shows that the Georgia Court of Appeals, rather than the Georgia Supreme Court, has jurisdiction over the above-styled action because this case does not involve issues specifically reserved to the Supreme Court by exclusive jurisdiction and pursuant to OCGA § 5-6-34(a) and Court of Appeals Rule 29.

III. STANDARD OF REVIEW

This case involved a bench trial on stipulated facts. (R. at 233). "[W]here the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo appellate review." ***Vansant v. State***, 264 Ga. 319, 320(1), 443 S.E.2d 474 (1994).

PART III.

I. ARGUMENT AND CITATION OF AUTHORITY

A. The trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal was informed of his implied consent rights in English only, without the benefit of a translation into Spanish and without any effort by the arresting officer to obtain such a translation even though such a translation was readily available.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-40); *see* ***Richards v. State***, 269 Ga. 483, 500 S.E.2d 581 (1998).

The trial court erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights and knowingly waived his right to additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was readily and immediately available through a telephonic translation service.

"[W]here a law enforcement officer requests a person to submit to a chemical test because of acts alleged to have been committed while operating a motor vehicle under the

influence of alcohol or drugs, and the officer arrests that person on this ground, OCGA § 40-6-392(a)(4) . . . requires that the officer inform him at the time of arrest of his right to an independent chemical analysis to determine the amount of alcohol or drugs present in his blood." ***Perano v. State***, 250 Ga. 704, 708, 300 S.E.2d 668 (1983). Failure to convey to the driver the implied consent rights renders the results of the state-administered test inadmissible in evidence. ***Vandiver v. State***, 207 Ga.App. 836(1), 429 S.E.2d 318 (1993); ***State v. Dull***, 176 Ga.App. 152, 154, 335 S.E.2d 605 (1985); ***Pruitt v. State***, 203 Ga.App. 125(2), 416 S.E.2d 524 (1992).

This Court explained the rationale for the implied consent rights in ***Nelson v. State***, 135 Ga.App. 212, 217 S.E.2d 450 (1975). "Under the former law . . . , a person arrested for DUI did not have a right to have an additional test made at the time of his arrest. [Cit.] Under the present law, this right is established. The state's 'justifiable failure or inability to obtain the additional test' must logically be preceded by the [defendant's] request for same. And the *sine qua non* of his request for the additional test would be his knowledge of his right to it. How is he to know of this right? Ordinarily, a person is presumed to know the law and his rights secured thereby. [Cits.] But where the statute itself provides that a person 'shall' be advised of his rights under the law, the legislature obviously meant to abrogate this presumption and replace it with the requirement that notice be given. Thus, it was necessary, under this statute, for the arresting officer to notify the appellant of his right to have an additional test made . . . [and] that this right be made known to the defendant at the time of his arrest. . . . In the absence of

the advice, the intoximeter test results are inadmissible." ***Id.*** at 213.

The trial court denied the Appellant's challenge to the failure to the officer to convey the implied consent rights in Spanish based on the holding in the case of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

In ***Tosar***, the defendant did not understand the implied consent rights read to him because he understood very little English. ***Id.*** at 886. The trial court suppressed the results of the breath test after finding that the State had failed to meet its burden of properly informing the defendant of his implied consent rights. ***Id.*** In ***Tosar***, this Court recognized that the officer failed to advise the suspect of his rights, but found that the failure was justified because, pursuant to O.C.G.A. §40-5-55(b) a non-English speaking driver, falls within a limited category of people deemed, as a matter of law, not to have revoked their implied consent because of 'a condition rendering [such person] incapable of refusal.'" ***Id.*** at 887.

This Court's reasoning in ***Tosar***, which equated a non-English speaking person with an unconscious person, is flawed because a non-English speaking person is certainly *capable* of understanding their implied consent rights, refusing to take the chemical test, or requesting an additional test ***when the implied consent rights are translated to them in their language***.

For instance, hearing impaired persons are similarly situated to non-English or language impaired persons in so far as both are unable to understand the spoken language without translation. As discussed in more detail in the next section of this brief dealing with the equal protection challenge, the legislature has adopted special

requirements for ***conveying*** through a qualified interpreter the implied consent rights to a hearing impaired person. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Thus, non-English or language impaired persons are not any more "incapable of refusing" than hearing impaired persons. Given the special rules controlling law enforcement officers communicating these same implied consent rights to hearing impaired persons, the legislature did not intent [sic] to lump all persons who are "incapable of comprehending [their] rights when read to [them]" into the category reserved for dead or unconscious persons.

This Court in ***Tosar*** also reasoned that the non-English speaking or language impaired person's inability to communicate with the officer invoked the provisions of O.C.G.A. §40-6-392(a)(3), which provides:

> "The ***justifiable*** failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer."

(emphasis added) ***Id.*** at 888. This Court reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, ***any*** failure to obtain an additional test is justified and the results of the state-administered tests are admissible." (emphasis added) ***Id.*** While the statute refers to a "justifiable" failure, this Court created a blanket rule allowing "any" failure when it applied that statute to a non-English speaking person. This blanket rule is not supported by the clear language of the statute which applies only to a "justifiable" failure.

Furthermore, in ***Tosar***, this Court used an "exigent circumstances" rationale to support the new blanket rule.

For instance, this Court reasoned that, as a matter of law, an "exigent circumstance" exception existed for language impaired or non-English speaking drivers based on the need to prevent destruction of evidence (which may occur by the dissipation of alcohol from a DUI suspect's blood while a warrant is obtained) ***while a foreign language translator was obtained***.

This "exigent circumstances" rationale is flawed for two reasons. First, the same rationale is not applied to hearing impaired persons who are guaranteed the right to a qualified interpreter despite the danger of destruction of evidence which may occur by the dissipation of alcohol while a translator is located. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Secondly, the "exigent circumstances" rationale assumes that obtaining a foreign language translation is impractical and time-consuming. In this case, the officer could have obtained a foreign language translation, and obtaining such a translation would have been both practical and readily available, as stipulated by the State. (R. at 237). Thus, the blanket rule in ***Tosar*** must be overruled or at least modified because its rationalizations and assumptions are inapplicable in this case, as applied to these facts.

At the time ***Tosar*** was decided, it may have been difficult or impractical to physically locate and obtain a foreign language translator to translate the implied consent rights in a timely manner. However, the same is not true today, as the stipulated facts of this case clearly demonstrate.

Tosar was decided in 1986, before foreign language translation services became readily available to law enforcement officers. However, for the past decade, foreign

language translation services have been ***instantly*** available to Cobb County police officers by simply using the nearest telephone. No delay in procuring a chemical sobriety test can now be asserted by the State as a constitutionally valid justification for a blanket denial of these rights.

In fact, in this case, the State stipulated to the fact that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing ***a toll free number***, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37).

It was further stipulated that telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the free business phones inside the Kroger store. (R. at 237). Finally, the parties stipulated that Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

Despite the fact that the translation services were readily available, the arresting officer made absolutely no effort to obtain a Spanish translation of the implied

consent rights for Mr. Furcal-Peguero. (R. at 237). The officer made no such effort even though he had determined that Mr. Furcal-Peguero spoke only broken English, and that English was his second language. (R. at 235). The officer was also aware that Mr. Furcal-Peguero's performance on the field tests revealed that *he could not fully* ***comprehend*** *the instructions* of how to perform the evaluations, as given to him in English. (R. at 235).

Under the facts of this case, Mr. Furcal-Peguero did not fall under the category of "dead, unconscious, or otherwise incapable of refusal" pursuant to O.C.G.A. § 40-5-55(b). A language impaired or non-English speaking driver is capable of refusal and capable of understanding his implied consent rights when reasonable accommodations are made to obtain a translation of those rights, which in this case would mean a translation of Mr. Furcal-Peguero's implied consent rights into Spanish. Such reasonable accommodations are already required for hearing impaired persons. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103.

It is also important to note that Mr. Furcal-Peguero was language impaired because of his race and national origin. Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236). His first and native language is Spanish. (R. at 236). On the night of his arrest, Mr. Furcal-Peguero had significant difficulty comprehending and speaking English. (R. at 237). In fact, his comprehension of English was "marginal." (R. at 237). In essence, Mr. Furcal-Peguero was not provided with an opportunity to understand his implied consent rights because of his race and nationality. There can be no justification for interpreting the statute in a manner which would discriminate against non-English speaking or language impaired

persons on the basis of race or national origin. Yet, that is exactly the holding of the ***Tosar*** decision, which the police officer in the instant case relied upon in making no effort to obtain a Spanish translation of the implied consent warnings. (R. at 237).

Under the facts of this case, no "exigent circumstances" exception could exist because, even the State has agreed and stipulated that the translation was readily available and not impractical. Mr. Furcal-Peguero was effectively denied his opportunity to make a knowing and intelligent decision about whether to submit to the breath test and whether to request an additional chemical test.

Therefore, the trial court erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights and knowingly waived his right to additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was both practical and readily available.

The standards set in other states recognize the importance of requiring that the implied consent rights are conveyed in the language spoken by the driver. For instance, in ***People v. Niedzwiecki***, 127 Misc.2d 919, 922, 487 N.Y.S.2d 694, 696 (1985), the New York court required a knowing refusal based on warnings in the driver's language "[n]otwithstanding the daily practicalities and the financial and logistical problems involved in preparing the police for all the various languages and dialects that

surface in New York." In requiring the translation for non-English speaking or language impaired drivers, the court reasoned that "if a defendant is to be faced with a decision, the results of which will be used as prima facie evidence against him in any subsequent criminal proceeding, he must reach a threshold point of understanding the choice presented to him, so he may at least be able to make a decision as to the course of conduct he will take." ***Id.***

Likewise, in ***People v. Wegielnik***, 562 N.E.2d 573, 205 Ill.App.3d 191 (1990), the Illinois court found that a driver cannot have his license suspended for refusing to take a chemical test unless the request for the test was given to him in a language that he can understand. Furthermore, the court recognized that "[p]ublic policy in Illinois permits drivers who speak languages other than English to secure a license using those languages." ***Id.***

The same public policy exists in Georgia. As stipulated to by the State, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). The same public policy considerations mandate that Mr. Furcal-Peguero should have been provided with a Spanish translation of his implied consent rights before he was deemed to have waived his right to an independent chemical test. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services render the results of the state administered chemical breath test inadmissible. Clearly this failure by the officer was not justified, "as applied" to the facts of this case.

Thus, this Court should hold that under the particular facts of this case, the officer's failure to obtain a readily available foreign translation of Mr. Furcal-Peguero's implied consent rights was unjustified under the circumstances and requires the suppression of the breath results.

B. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Mr. Furcal-Peguero, who is similarly situated to hearing impaired persons, was denied equal protection under the State and Federal Constitution, when pursuant to O.C.G.A. §§ 24-9-100 through 24-9-103, 40-5-55(b), and 40-6-392(a)(3) the Appellant's disparate treatment as a language impaired or non-English speaking person is based on nationality, a suspect classification.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level is determined by the State's chemical breath test was preserved for appeal. (R. at 238-41).

The effect of the code sections at issue is to deprive Mr. Furcal-Peguero of the equal protection of the laws in violation of both the state and federal constitutions. *See* 1983 Ga. Const., art. I, sec. I, par. II.; U.S. Const. amend. XIV, § 1.

The equal protection clause of the Georgia Constitution is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution. *See* ***Barge-Wagener Constr. Co. v. Morales***, 263 Ga. 190, 429 S.E.2d 671 (1993); ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981); ***Suber v.***

Bulloch County Bd. of Educ., 722 F.Supp. 736 (S.D.Ga.1989).

When considering an equal protection challenge, the proper inquiry is whether the statute applies equally to all those accused under it, and therefore does not create disparate classifications among similarly situated persons. ***Sims v. State***, 260 Ga. 782(1), 399 S.E.2d 924 (1991).

The statute, O.C.G.A. § 24-9-103, violates the equal protection clause of the Georgia Constitution and the Fourteenth Amendment to the United States Constitutions because it provides preferential treatment to persons who are hearing impaired, while not providing the same treatment to similarly situated persons who are language impaired. Language impaired or non-English speaking person's [sic] are similarly situated to hearing impaired persons in that both cannot readily understand or communicate in the spoken language when the arresting officer reads to them their implied consent rights without the help of a translator. A classification which treats hearing impaired persons differently from similarly situated language impaired or non-English speaking persons involves a suspect classification. Therefore, language impaired or non-English speaking persons are entitled to the same measure of justice and the same equal protection of the law that hearing impaired persons are afforded under Georgia statutory law.

Pursuant to O.C.G.A. § 24-9-100, "[i]t is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, ***cannot readily understand or communicate in the spoken language*** and who cannot equally participate or benefit from proceedings, programs, and activities of the courts,

legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivision unless qualified interpreters are available to assist them." (Emphasis added).

O.C.G.A. § 24-9-103(b)(1) also provides that a hearing impaired person, upon being placed into custody, has a right to no interrogation, warning, information of rights, taking of statements, or other investigatory procedure to be undertaken ***until a qualified interpreter has been provided***. Hence, the provisions of O.C.G.A. § 24-9-103 are clearly applicable to any hearing impaired person taken into custody for allegedly violating any criminal law. ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001) (applied to the implied consent rights of a DUI suspect); ***State v. Woody***, 215 Ga.App. 448, 450, 449 S.E.2d 615 (1994).

Being "hearing impaired" does ***not*** require a ***complete absence of hearing ability***, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversational tone. O.C.G.A. § 24-9-101(3); ***Yates*** at 37. Furthermore, the requirements in the statute are ***mandatory***, and if not met, the evidence acquired by law enforcement officers is not admissible under the statute. ***Id.***

This court has previously stated that, "[a]s with hearing persons, the implied consent rights must be conveyed to the hearing impaired person; the only means of conveying those rights sanctioned by the hearing impaired law is by a sign language interpreter." ***Allen v. State***, 218 Ga.App. 844, 846, 463 S.E.2d 522 (1995). Likewise, this Court must recognize that implied consent

rights must be conveyed to the language impaired or non-English speaking person; ***the only means of conveying those rights is by a foreign language interpreter***.

Hearing impaired persons are treated differently from language impaired or non-English speaking persons who cannot readily understand or communicate in the spoken language under O.C.G.A. § 24-9-103 and O.C.G.A. § 40-5-55. Mr. Furcal-Peguero is similarly situated to defendants who are hearing impaired because he was not able to readily understand or communicate in the spoken language. Additionally, Mr. Furcal-Peguero is subject to disparate treatment because the Georgia statutory scheme under which he is charged does not provide him with the right to have his important implied consent rights translated to him in his native language, Spanish. In other words, the implied consent rights were clearly not ***conveyed*** to Mr. Furcal-Peguero because he could only marginally understand English. The only way to have conveyed the implied consent rights to Mr. Furcal-Peguero, who was similarly situated with a hearing impaired person, was through a translator.

Under an equal protection analysis, the appropriate standard of scrutiny must be determined. However, in this case, the classification system which provides disparate treatment to non-English speaking or language impaired persons would fail ***any*** standard of scrutiny.

"There are three standards generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and [Georgia] Constitutions: (1) the rational relationship test; (2) The intermediate level of scrutiny; and (3) the strict judicial scrutiny standard.

Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. The intermediate level of judicial scrutiny requires that a classification be substantially related to an important governmental objective. (Citation and punctuation omitted.) ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981).

"Under the strict judicial scrutiny standard, which is employed when a classification involves socially stigmatic inequalities, such as those based on race . . . the governmental classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective." ***Id.*** (citing ***San Antonio School District v. Rodriguez***, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); ***Graham v. Richardson***, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); ***Shapiro v. Thompson***, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)); *see also* ***Parks v. State***, 254 Ga. 403, 330 S.E.2d 686 (1985).

"Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity and that the State bears the burden of proving that the classification system 'has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the less "drastic means" for effectuating its objectives.'" ***Id.*** (Citations omitted).

The current Georgia statutes set up a ***suspect classification*** that requires strict scrutiny. In this case, the classification system set up for hearing impaired persons excludes language impaired or non-English speaking

persons from the protections offered and legally guaranteed to hearing impaired persons. The decisions of the U.S. Supreme Court have clearly established the classifications based on national origin or race, are inherently suspect and subject to close judicial scrutiny. ***Graham v. Richardson***, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Language impaired or non-English speaking persons as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. ***Id.***

The Supreme Court of the United States recognized the close nexus between the ability to speak English and ethnicity in ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). In ***Hernandez***, the Supreme Court noted in the context of jury selection "that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). Additionally, federal courts have noted that "the Fourteenth Amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or ***linguistic characteristics***." (emphasis added) ***United States v. Uvalde Consol. Indep. Sch. Dist.***, 625 F.2d 547, 553 (5th Cir. 1980).

The "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ***Kiyoshi Hirabayashi v. United State*** [sic], 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, 1786 (1943). Of course, "an individual's primary language skills generally flows from his or her national origin." ***Olagues v. Russoniello***, 797 F.2d 1511, 1520 (9th Cir. 1986),

vacated on grounds of mootness, 484 U.S. 806, 108 S.Ctr. [sic] 1278, 1294, 36 L.Ed2d 16, 40 (1973).

In this case, not only is there no compelling state interest in failing to provide a non-English speaking person with a translation of their implied consent rights, there is not even a legitimate governmental purpose for such treatment. In the instant case, we have a person who did not speak or understand English fluently and who was not provided a translation of his implied consent rights after an arrest for DUI. Relying on the ***Tosar*** decision, the arresting officer made ***absolutely no effort*** to obtain a translation of Mr. Furcal-Peguero's important legal rights. (R. at 236).

On the other hand, hearing impaired persons, who would also be unable to fully understand their implied consent rights are accorded the benefit of a mandatory translation by a qualified translator. There is no justification for this distinction between classifications of persons who bear such significant similarities.

A person's inability to speak and understand English because of their national origin places the person within a suspect class for purposes of equal protection analysis. The facts of this case compel that ***Tosar*** be revisited and overturned, or at least modified to end the blanket policy of law enforcement officers' taking the meaningless step of reading important legal rights in English to language impaired or non-English speaking persons who would [sic] are unable to comprehend the meaning and significance of those rights without a translation. The constitutional infirmity of such a blanket policy is clearly revealed by the compelling facts of this case.

What we have in this controversy are two similarly situated persons, the hearing impaired person and the non-English speaking person, both of whom are unable to understand a police officer's reading of the implied consent rights. However, the statute provides ***dissimilar*** treatment of these similarly situated persons. Hearing impaired persons are afforded a *mandatory* translation while non-English speaking persons are absolutely denied a translation of their implied consent rights. the ***Tosar*** decision gives the police the right, as a matter of law, to recite the implied consent warnings in English only, even if the suspect is totally incapable of deciphering a single word of the advisements. Clearly, this is unequal treatment for which no compelling (or even legitimate) state interest justifies providing disparate treatment based on race and nationality to language impaired or non-English speaking persons.

This dissimilar treatment rises to the level of constitutional impermissibility. This conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution.

C. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because the Appellant's Due Process Rights under the federal and state constitutions were violated when the arresting officer failed to adequately advise the Appellant of his right to an independent test.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol

level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

The United States Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1; Ga. Const.Art. I, Sec. I, Para. I. The fundamental idea of due process is notice and an opportunity to be heard. ***Citizens & Contractors Bank v. Maddox***, 175 Ga. 779, 784-85, 166 S.E. 227 (1932).

The statutory scheme which permitted the arresting officer to fail to convey the implied consent rights to Mr. Furcal-Peguero violates due process because the scheme is arbitary [sic] and capricious. State legislation is constitutional with respect to due process if it bears a rational relation to a proper and constitutionally permitted legislative purpose. ***State v. Major***, 243 Ga. 255, 257, 253 S.E.2d 724 (1979).

In this case, as discussed in the previous section, the statutory scheme which permits officers to fail to advise a non-English speaking or hearing impaired person of their implied consent rights does not bear any rational relation to a proper and constitutionally permitted legislative purpose. Under this scheme, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). However, no such translation is required for the implied consent rights of non-English speaking or language impaired persons. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services render the results of the state administered chemical breath test inadmissible. Clearly

this failure by the officer was not justified, "as applied" to the facts of this case.

D. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against self-incrimination under the Fifth Amendment of the Constitution of the United States of America, Ga. Const. 1983, Art. I, Sec. I, Par. XVI, or O.C.G.A. § 24-9-20 were violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

The State's use of the breath sample as evidence against Mr. Furcal-Peguero violated his rights against self-incrimination under the state and federal constitutions. 1983 Ga. Const. Art. I, § I, Para. XVI.; O.C.G.A. § 24-9-20.

The statutory scheme which allows an officer to fail to convey the implied consent rights to a non-English speaking or language impaired person is so misleading or incomplete that no real choice exists. In essence, this is a case where the legislature has "subtly coerced [a defendant] into choosing the option it had no right to compel, rather than offering a true choice." ***South Dakota v. Neville***, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748

(1983); ***Wessels v. State***, 169 Ga.App. 246(1), 312 S.E.2d 361 (1983).

The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine in finding that the Appellant's rights against self-incrimination under the due process clause of the federal and state constitutions were not violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

E. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against unlawful search and seizure under the Fourth Amendment of the Constitution of the United States of America and Ga. Const. 1983, Art. I, Sec. I, Par. XIII were violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without being informed of his implied consent rights when the consent to take the test was not made knowingly or voluntarily.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level was determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

Because chemical testing of an individual's blood, breath or urine implicates Fourth Amendment rights, any consent thereto must be made knowingly and voluntarily. *See* ***Raulerson v. State***, 268 Ga. 623, 491 S.E.2d 791

(1997); ***State v. Johnston***, 249 Ga. 413, 291 S.E.2d 543 (1982). Mr. Furcal-Peguero's consent to take the breath test was not made knowingly or voluntarily because his implied consent rights were not conveyed to him in words and language that he could comprehend. Thus, the trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine in finding that Mr. Furcal-Peguero's rights against unlawful search and seizure were not violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without meaningfully being informed of his implied consent rights.

II. CONCLUSION

Mr. Furcal-Peguero was denied the right, afforded to English speaking and hearing impaired drivers, to have the officer convey his implied consent rights to him before he was asked to submit to a breath test. Under the facts of this case, as applied, Mr. Furcal-Peguero's "consent" to the breath test was not made knowingly or voluntarily.

This Court's decision in ***Tosar***, and the statutory scheme in Georgia sets up a blanket rule which denies equal protection to non-English speaking or language impaired persons based on national origin in violation of the equal protection and due process clauses under the state constitution. Moreover, the statutory scheme also violates clear constitutional precedent under both the equal protection clause and the due process clause of United States Constitution. The breath test in this case should have been suppressed, and trial court's failure to suppress the breath test requires that this case be reversed.

Respectfully submitted this 31st day of December, 2001.

/s/ [Illegible]
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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,	:	
Appellant,	:	
v.	:	Case No.: A02A0792
STATE OF GEORGIA,	:	
Appellee.	:	

III. CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Appellant's Brief upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: December 31, 2001

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RESP. APPENDIX B

IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Case No. A02A0792

APPELLANT'S MOTION
FOR RECONSIDERATION

(Filed May 31, 2002)

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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO, Appellant,	:	Case No. A02A0792
v.	:	
STATE OF GEORGIA, Appellee.	:	

MOTION FOR RECONSIDERATION

COMES NOW, Appellant who respectfully requests that this Honorable Court reconsider its decision of May 21, 2002, in the above referenced case.

As a preliminary matter, this Court failed to issue any ruling on three of the five enumerated errors properly raised by the Appellant. In its opinion, this Court recognized that Mr. Furcal-Peguero enumerated five errors. ***Furcal-Peguero v. State***, ___ Ga.App. ___, *5, ___ S.E.2d ___ (Case No. A02A0792; May 21, 2002). This Court then failed to address, in any manner whatsoever, the last three errors raised by Mr. Furcal-Peguero.

This Court must now grant this motion for reconsideration and issue an opinion on whether Mr. Furcal-Peguero's conviction must be reversed because of the last three errors raised by Mr. Furcal-Peguero. Specifically, this Court must decide the following: (1) whether Mr. Furcal-Peguero's due process rights were violated when the officer failed to adequately inform him of his implied consent rights; (2) whether Mr. Furcal-Peguero's rights

against self-incrimination were violated when Mr. Furcal-Peguero was compelled to take the breath test without being adequately informed of his implied consent rights; and (3) whether Mr. Furcal-Peguero's rights against unlawful search and seizures were violated when he was compelled to submit to the breath test, without being adequately informed of his implied consent rights.

Secondly, this Court failed to issue an opinion on whether Mr. Furcal-Peguero's rights to equal protection under the State Constitution and the Federal Constitution was violated. Instead, this Court merely noted that Georgia law requires a limited accommodation for hearing impaired drivers because it is an immutable physical disability. ***Id.*** at *8. Then, this Court concluded that "[t]he results of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent." ***Id.*** at *9-10. Finally, this Court concluded that "[t]he trial court did not err in admitting the results of the state administered breath-test." ***Id.*** at *10.

This court opinion on the equal protection challenge raised by Mr. Furcal-Peguero is wholly inadequate. The first step in any equal protection analysis is to determine whether the alleged constitutional violation involves individuals who are similarly situated as to the subject matter of the legislation. *See* ***Etkind v. Suarez***, 271 Ga. 352, 355(3), 519 S.E.2d 210 (1999); *see also* ***Zach, Inc. v. Fulton County***, 235 Ga.App. 478-479(1), 509 S.E.2d 746 (1998). Thus, this Court must determine whether a non-English speaking person is similarly situated with a

hearing-impaired person in that neither are able to understand their implied consent rights without an interpreter.

The second step in an equal protection analysis is to determine the level of scrutiny to be applied in determining whether the disparate treatment is justifiable. ***Sisson v. State***, 232 Ga.App. 61, 53, 499 S.E.2d 422 (1998). There are three levels of scrutiny generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and Georgia Constitutions: (1) the rational relationship test; (2) the intermediate level of scrutiny; and (3) the strict judicial scrutiny standard. ***Id.***

The final step of an equal protection analysis requires that this Court apply the appropriate level of scrutiny to determine whether the state interest justifies providing disparate treatment to hearing impaired persons compared with the treatment provided to non-English speaking persons. ***See id.*** Under the statutory scheme, only the former are entitled under the law to a translation of their implied consent rights. This Court must now reconsider its decision of May 21, 2002, and issue an opinion that properly considers the equal protection challenge.

Finally, this Court refused to consider the first enumeration of error that the trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal-Peguero was informed of his implied consent rights in English only, without the benefit of any attempt to make a translation into Spanish and without any effort by the arresting officer to obtain such a translation even though such a translation was readily and immediately available. "[T]he *sine qua non* of [the

driver's] request for the additional test would be his knowledge of his right to it." ***Nelson v. State***, 135 Ga.App. 212, 213, 217 S.E.2d 450 (1975). Because Mr. Furcal-Peguero's implied consent rights were not conveyed to him in a language that he could understand and because he could not communicate with the officer to request an additional test, he could not be deemed to have waived his right to an additional chemical test.

Although not discussed by this court in its opinion of May 21, 2002, in ***Tosar*** this Court addressed this issue by reasoning that the non-English speaking driver's inability to communicate with the officer invoked the provisions of O.C.G.A. § 40-6-392(a)(3) which refers to "the justifiable failure or inability" to obtain an additional test. 180 Ga.App. 885, 888, 350 S.E.2d 811 (1986). The ***Tosar*** court then reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, any failure to obtain an additional test is justified and the results of the state-administered tests are admissible. ***Id.*** The ***Tosar*** court justified this holding under an "exigent circumstances" rationale based on the need to prevent destruction of evidence which may occur by the dissipation of alcohol from a DUI suspect's blood while a foreign language translator was obtained. ***Id.***

Likewise, this Court invoked the "exigent circumstances" rationale in this case reasoning that "[b]ecause removing impaired drivers from our highways and roads is a critical public safety function, and because the level of alcohol or drugs in a person's blood, breath, or urine inevitably changes over time, police officers must be able to initiate the evidence collection process without unreasonable delay." (citations omitted) ***Id.*** at *8-9. Of course,

this rationale ignores the fact that in this case, the translation service was readily available and immediately accessible to the officer. (R. at 236). Furthermore the officer was aware of the translation service and under the circumstances of this case the use of the translation service would not have been impractical. (R. at 236-237). Thus, the "exigent circumstances" rationale invoked in ***Tosar*** has absolutely no relevancy in a case in which a translation service is ***immediately*** available. Thus, this Court should reconsider its opinion of May 21, 2002, and address the fact that the "exigent circumstances" rationale has no application under the facts of this case. Furthermore, this Court should hold that under the facts of this case, the officer's failure to obtain a translation of the implied consent rights was not justified, rendering the breath test results inadmissible.

Respectfully submitted this 31st day of May.

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IN THE COURT OF APPEALS
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STATE OF GEORGIA,	:	
Appellee.	:	

III. CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Appellant's Motion for Reconsideration upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: May 31, 2002

/s/ [Illegible]
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RESP. APPENDIX C

IN THE GEORGIA SUPREME COURT
APPLICATION NO. ___

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI

Court of Appeals Case No. A02A0792

Supreme Court Case No. _____

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APPLICATION FOR CERTIORARI

COMES NOW the Petitioner, by counsel, and requests that the Supreme Court issue a Writ of Certiorari to the Georgia Court of Appeals to review the decision of that Court on the above referenced criminal case dated May 21, 2002, reconsideration denied, June 12, 2002. Thus, this Petition for Certiorari is timely filed pursuant to Supreme Court Rule 38. A true and accurate copy of the decision complained of is attached hereto (See Exhibit "A").

This Petitioner [sic] for Certiorari should be granted because the issues involved in this case concern the rights of a "Non-English" speaking driver under suspicion for DUI under the implied consent statutes of this state. This Court has already granted Certiorari in a case involving similar facts, ***Omar Rodriguez v. The State***, Supreme Court Case No. S02A0412. This Court should also grant certiorari in this case because the issues presented herein are more clearly presented in this case involving stipulated facts than in ***Omar Rodriguez v. The State***, Supreme Court Case No. S02A0412.

STATEMENT OF JURISDICTION

This Petition for Certiorari is based upon erroneous application of existing Georgia case law. *See* ***Southern Guaranty Insurance Company of Georgia v. Goddard***, 259 Ga. 257, 379 S.E.2d 778 (1989). The circumstances of the case are of "great concern, gravity, and importance to the public." ***Country Club Apartments, Inc. v. Scott***, 246 Ga. 443, 271 S.E.2d 841 (1980).

ENUMERATION OF ERROR

A. The Court of Appeals erred in failing to hold that Petitioner's equal protections rights were violated when Petitioner, as a non-English speaker who is similarly situated to a hearing impaired person, was given disparate treatment when the police officer made absolutely no effort to advise Petitioner of his implied consent warnings through a translator.

B. The Court of Appeals erred when it held that because Petitioner did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application" even though Petitioner was a non-English speaker who could not *knowingly* waive his right to an independent test when the police officer made absolutely no attempt to obtain a translation of the implied consent rights even though the officer knew that such a translation service was practical and immediately available.

II. STATEMENT OF FACTS

In this case, the State and the Appellant, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant to stipulated facts. (R. at 233). It was the intention of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trial court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. (R. at 233, 238-43).

In exchange for the case being tried on stipulated facts and without a jury, the State agreed to proceed only

on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 233). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation. (R. at 233; T.[1] at 20).

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. 233, 238-43). In the motion, the parties stipulated to the following facts as being "controlling, complete and binding" in this case:

1. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia (R. at 234).

2. Cobb County police were called to a Kroger store parking lot at 4455 Floyd Road, Mableton, Georgia, by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. (R. at 234). The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. (R. at 234). The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call. (R. at 234).

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[1] Hereinafter "T" refers to the transcript of the bench trial on stipulated facts held before the Honorable Robert E. McDuff on October 20, 2001 in the city of Marietta, Cobb County, Georgia.

3. Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. DeSaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. (R. at 234). The Cobb County police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia driver's license. (R. at 234).

4. A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. (R. at 234). However, the automobile was not running when the police arrived. (R. at 234).

5. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession. (R. at 234).

6. Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence (R. at 235).

7. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language (R. at 235). Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English (R. at 235).

8. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the following implied consent rights under O.C.G.A. §§ 40-5-55 and 40-5-67.1:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state will be suspended and, if you are convicted of having such an alcohol concentration, will be revoked. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine or other bodily substances at your own expense and from qualified personnel of your choosing. Will you submit to the state administered chemical tests of your BREATH under the implied consent law?

(R. at 235-36). The advisement takes one to two minutes to read in its entirety (R. at 236).

9. The parties stipulated that the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. (R. at 236). Mr. Furcal-Peguero's first and "native language" is Spanish. (R. at 236). Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236).

10. Additionally, the parties stipulated that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police

officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all the three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37). Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. (R. at 237). Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

11. The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. (R. at 237). The arresting officer read the rights only in English and only one time. (R. at 237). Furthermore, the officer made no effort to obtain a Spanish translation. (R. at 237).

12. Mr. Furcal-Peguero neither asked for nor was offered a translator. (R. at 237). Mr. Furcal-Peguero ultimately did take the State's breath test. (R. at 237). The parties agreed that the breath test results were the *sine qua non* of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 237).

13. Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had

significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical test under Georgia's implied consent law, his right to obtain independent tests, etc. (R. at 237). In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. (R. at 237).

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. at 238-43). The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties,

the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986). (R. at 20).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (T. at 20). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. (T. at 24). Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service. (T. at 24).

From this conviction and sentence, Mr. Furcal-Peguero appealed to the Court of Appeals raising several errors, including: (1) whether the disparate treatment provided to Mr. Furcal-Peguero, as a non-English speaker, violated the Equal Protection provisions of the state and federal constitutions when similarly-situated "hearing-impaired" person were entitled to a translation of their implied consent warnings, and (2) whether the trial court erred in finding that Mr. Furcal-Peguero ***knowingly*** waived his right to an additional chemical test when the police officer made no attempt to obtain a translation of implied consent warnings or provide him with a translator so that he would have the ability to communicate to the officer any request for an additional chemical test. The Court of Appeals affirmed the conviction. *See* ***Exhibit A***.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals erred in failing to hold that Petitioner's equal protections rights were violated when Petitioner, as a non-English speaker who is similarly situated to a hearing impaired person, was given disparate treatment when the police officer made absolutely no effort to advise Petitioner of his implied consent warnings through a translator.

As [sic] the heart of this appeal is one central question: Now that instantly available language translation service is available, and PRE-PAID by the state, is that service only to be used for confessions, or do our constitutional protections extend far enough to permit a non-English speaker to have language assistance at a critical post-arrest advisement of his legal rights?

The Court of Appeals in deciding this issue failed to issue an opinion on whether Mr. Furcal-Peguero's right to equal protection under the State Constitution and the Federal Constitution was violated. Instead, the Court of Appeals merely noted that Georgia law requires a limited accommodation for hearing impaired drivers because it is an immutable physical disability. ***Exhibit A*** at 8. Then the court concluded that "[t]he results of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent." ***Exhibit A*** at 9-10. Finally, the court concluded that "[t]he trial court did not err in admitting the results of the state administered breath-test." ***Exhibit A*** at 10.

The effect of the code sections at issue is to deprive Mr. Furcal-Peguero of the equal protection of the laws in violation of both the state and federal constitutions. *See* 983 Ga. Const., art. I, sec. I, par. II.; U.S. Const. amend. XIV, § 1. The equal protection clause of the Georgia Constitution is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution. *See* ***Barge-Wagener Constr. Co. v. Morales***, 263 Ga. 190, 429 S.E.2d 671 (1993); ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981); ***Suber v. Bulloch County Bd. of Educ.***, 722 F.Supp. 736 (S.D.Ga.1989).

When considering an equal protection challenge, the proper inquiry is whether the statute applies equally to all those accused under it; and therefore does not create disparate classifications among similarly situated persons. ***Sims v. State***, 260 Ga. 782(1), 399 s.e.2d 924 (1991).

The Statute, O.C.G.A. § 24-9-103, violates the equal protection clause of the Georgia Constitution and the Fourteenth Amendment to the United States Constitutions because it provides preferential treatment to persons who are *hearing* impaired, while not providing the same treatment to similarly situated persons who are *language* impaired. Language impaired or non-English speaking persons's are similarly situated to hearing impaired persons in that both cannot readily understand or communicate in the spoken language when the arresting officer reads to them their implied consent rights without the help of a translator. A classification which treats hearing impaired persons differently from similarly situated language impaired or non-English speaking persons involves a suspect classification. Therefore, language impaired or non-English speaking persons are

entitled to the same measure of justice and the same equal protection of the law that hearing impaired persons are afforded under Georgia statutory law.

Pursuant to O.C.G.A. § 24-9-100, "[i]t is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, *cannot readily understand or communicate in the spoken language* and who cannot equally participate or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivision unless qualified interpreters are available to assist them." (Emphasis added).

O.C.G.A. § 24-9-103(b)(1) also provides that a hearing impaired person, upon being placed into custody, has a right to no interrogation, warning, information of rights, taking of statements, or other investigatory procedure to be undertaken *until a qualified interpreter has been provided*. Hence, the provisions of O.C.G.A. § 24-9-103 are clearly applicable to any hearing impaired person taken into custody for allegedly violating any criminal law. ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001) (applied to the implied consent rights of a DUI suspect); ***State v. Woody***, 215 Ga.App. 448, 450, 449 S.E.2d 615 (1994). Being "hearing impaired" does *not* require a *complete absence of hearing ability*, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversational tone. O.C.G.A. § 24-9-101(3); ***Yates*** at 37. Furthermore the requirements in the statute are *mandatory*, and if not met, the evidence acquired by law enforcement officers is not admissible under the statute. ***Id.***

The Court of Appeals has previously stated that, "[a]s with hearing persons, the implied consent rights must be conveyed to the hearing impaired person; the only means of conveying those rights sanctioned by the hearing impaired law is by a sign language interpreter." ***Allen v. State***, 218 Ga.App. 844, 846, 463 S.E.2d 522 (1995). Likewise, this Court must recognize that implied consent rights must be conveyed to the language impaired or non-English speaking persons; ***the only means of conveying those rights is by a foreign language interpreter***.

Hearing impaired persons are treated differently from language impaired or non-English speaking persons who cannot readily understand or communicate in the spoken language under O.C.G.A. § 24-9-103 and O.C.G.A. § 40-5-55. Mr. Furcal-Peguero is similarly situated to defendants who are hearing impaired because he was not able to readily understand or communicate in the spoken language. Additionally, Mr. Furcal-Peguero is subject to disparate treatment because the Georgia statutory scheme under which he is charged does not provide him with the right to have his important implied consent rights translated to him in his native language, Spanish. In other words, the implied consent rights were clearly not ***conveyed*** to Mr. Furcal-Peguero because he could only marginally understand English. The only way to have ***conveyed*** the implied consent rights to Mr. Furcal-Peguero, who was similarly situated with a hearing impaired person, was through a translator.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the results of the blood alcohol test as determined by the State's chemical breath test was preserved for appeal. (R. at 238-41).

This Court has recognized the importance of the [sic] having a statewide plan for the use of Interpreters by the Courts of Georgia "to secure the rights of non-English speaking persons." *See* ***Use of Interpreters for Non-English Speaking Persons***, Georgia Supreme Court (October 20, 2001). In defining "Non-English Speaker," this Court adopted the following definition:

> "Non-English Speaker" means any party or witness who cannot readily understand or communicate in spoken English and who consequently cannot equally participate in or benefit from the proceedings unless an Interpreter is available to assist him or her. The fact that a person for whom English should not prohibit that individual from being allowed to have an Interpreter[.]

Id. This definition of a "Non-English Speaker" closely mirrors the definition of a "Hearing-Impaired Person" as defined in ***Yates v. State***, 248 Ga.App. 35, 37, 545 S.E.2d 169 (2001) (reasoning that "hearing impaired" does not require a complete absence of hearing ability, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversation tone).

Under the rule establish [sic] by this Court, Mr. Furcal-Peguero clearly qualifies as a "non-English speaker" because it was not in dispute that "the arresting officer was able to determine that [Mr. Furcal-Peguero] spoke only broken English, and that English was his second language." (R. at 235). Furthermore, it was not in dispute that Mr. Furcal-Peguero's "performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. (R. at 235). Finally, the

State stipulated that at the time of the arrest, Mr. Furcal-Peguero had significant difficulty comprehending English and had significant difficulty speaking English fluently. (R. at 237). In fact, Mr. Furcal-Peguero's "comprehension of English was so marginal that permitting him to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights . . . " (R. at 237). Under the facts of this case, it is undeniable that Mr. Furcal-Peguero qualifies as a "non-English speaker" who is similarly situated with a "hearing impaired" person. Thus, Mr. Furcal-Peguero should have been provided with the same access to an interpreter that a hearing impaired person would have been entitled to before the results of his state administered breath test became admissible into evidence against him.

Under an equal protection analysis, the appropriate standard of scrutiny must be determined. However, in this case, the classification system which provides disparate treatment to non-English speaking or language impaired persons would fail *any* standard of scrutiny. "There are three standards generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and [Georgia] Constitutions: (1) The rational relationship test; (2) The intermediate level of scrutiny; and (3) The strict judicial scrutiny standard. Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. The intermediate level of judicial scrutiny requires that a classification be substantially related to an important governmental objective. (Citation and punctuation omitted.) ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981).

"Under the strict judicial scrutiny standard, which is employed when a classification involves socially stigmatic inequalities, such as those based on race . . . the governmental classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective." ***Id.*** (*citing* ***San Antonio School District v. Rodriguez***, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); ***Graham v. Richardson***, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); ***Shapiro v. Thompson***, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)); *see also* ***Parks v. State***, 254 Ga. 403, 330 S.E.2d 686 (1985).

"Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity and that the State bears the burden of proving that the classification system 'has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the less "drastic means" for effectuating its objectives.'" ***Id.*** (citations omitted).

The current Georgia statutes set up a ***suspect classification*** that requires strict scrutiny. In this case, the classification system set up for hearing impaired persons excludes language impaired or non-English speaking persons from the protections offered and legally guaranteed to hearing impaired persons. The decisions of the U.S. Supreme Court have clearly established that classifications based on national origin or race, are inherently suspect and subject to close judicial scrutiny. ***Graham v. Richardson***, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Language impaired or non-English speaking persons as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. ***Id.***

The Supreme Court of the United States recognized the close nexus between the ability to speak English and ethnicity in ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). In ***Hernandez***, the Supreme Court noted in the context of jury selection "that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). Additionally, federal courts have noted that "the Fourteenth Amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or ***linquistic characteristics***." (emphasis added) ***United States v. Uvalde Consol. Indep. Sch. Dist.***, 625 F.2d 547, 553 (5th Cir. 1980).

The "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ***Kiyoshi Hirabayashi v. United States***, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, 1786 (1943). Of course, "an individual's primary language skills generally flows from his or her national origin." ***Olagues v. Russoniello***, 797 F.2d 1511, 1520 (9th Cir. 1986), *vacated on grounds of mootness*, 484 U.S. 806, 108 S.Ctr. [sic] 1278, 1294, 36 L.Ed2d 16, 40 (1973).

In this case, not only is there no compelling state interest in failing to provide a non-English speaking person with a translation of their implied consent rights, there is not even a legitimate governmental purpose for such treatment. In the instant case, we have a person who did not speak or understand English with any degree of proficiency and who was not provided a translation of his implied consent rights after an arrest for DUI. Relying on

the ***Tosar*** decision, the arresting officer made ***absolutely no effort*** to obtain a translation of Mr. Furcal-Peguero's important legal rights. (R. at 236).

On the other hand, hearing impaired persons, who would also be unable to fully understand their implied consent rights are accorded the benefit of a mandatory translation by a qualified translator. There is no justification for this distinction between classifications of persons who bear such significant similarities.

A person's inability to speak and understand English because of their national origin places the person within a suspect class for purposes of equal protection analysis. The facts of this case compel that ***Tosar*** be revisited and overturned, or at least modified to end the blanket policy of law enforcement officers' taking the meaningless step of reading important legal rights in English to language impaired or non-English speaking persons who would [sic] are unable to comprehend the meaning and significance of those rights without a translation. The constitutional infirmity of such a blanket policy is clearly revealed by the compelling facts of this case.

What we have in this controversy are two similarly situated persons, the hearing impaired person and the non-English speaking person, both of whom are unable to understand a police officer's reading of the implied consent rights. However, the statute provides ***dissimilar*** treatment of these similarly situated persons. Hearing impaired persons are afforded a *mandatory* translation while non-English speaking persons are absolutely denied a translation of their implied consent rights. The ***Tosar*** decision gives the police the right, as a matter of law, to recite the implied consent warnings in English only, even

if the suspect is totally incapable of deciphering a single word of the advisements. Clearly, this is unequal treatment for which no compelling (or even legitimate) state interest justifies providing disparate treatment based on race and nationality to language impaired or non-English speaking persons.

This dissimilar treatment rises to the level of constitutional impermissibility. This conduct violates the Equal provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution.

B. Whether the Court of Appeals erred when it held that because Petitioner did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application" even though Petitioner was a non-English speaker who could not *knowingly* waive his right to an independent test when the police officer made absolutely no attempt to obtain a translation of the implied consent rights even though the officer knew that such a translation service was practical and immediately available.

The Court of Appeals erred in finding that because Mr. Furcal-Peguero did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application." Of course this analysis completely ignores the fact that the implied consent warnings were not conveyed to Mr. Furcal-Peguero in a language that he could understand, which was a fact that the State agreed was not in dispute at trial. Furthermore, the analysis of the Court of Appeals ignores the fact that Mr. Furcal-Peguero, as a non-English speaker was not in a position to "request" an independent

test because [sic] could not communicate with the officer without the assistance of a translator.

"[W]here a law enforcement officer requests a person to submit to a chemical test because of acts alleged to have been committed while operating a motor vehicle under the influence of alcohol or drugs, and the officer arrests that person on this ground, OCGA § 40-6-392(a)(4) . . . requires that the officer inform him at the time of arrest of his right to an independent chemical analysis to determine the amount of alcohol or drugs present in his blood." ***Perano v. State***, 250 Ga. 704, 708, 300 S.E.2d 668 (1983). Failure to convey to the driver the implied consent rights renders the results of the state-administered test inadmissible in evidence. ***Vandiver v. State***, 207 Ga.App. 836(1), 429 S.E.2d 318 (1993); ***State v. Dull***, 176 Ga.App. 152, 154, 335 S.E.2d 605 (1985); ***Pruitt v. State***, 203 Ga.App. 125(2), 416 S.E.2d 524 (1992).

This Court explained the rationale for the implied consent rights in ***Nelson v. State***, 135 Ga.App. 212, 217 S.E.2d 450 (1975). "Under the former law . . . , a person arrested for DUI did not have a right to have an additional test made at the time of his arrest. [Cit.] Under the present law, this right is established. The state's 'justifiable failure or inability to obtain the additional test' must logically be preceded by the [defendant's] request for same. And the *sine quo non* of his request for the additional test would be his knowledge of his right to it. How is he to know of his right? Ordinarily, a person is presumed to know the law and his rights secured thereby. [Cits.] but where the statute itself provides that a person 'shall' be advised of his rights under the law, the legislature obviously meant to abrogate this presumption and replace it with the requirement that notice be given. Thus, it was

necessary, under this statute, for the arresting officer to notify the appellant of his right to have an additional test made . . . [and] that this right to be made known to the defendant at the time of his arrest. . . . In the absence of the advice, the intoximeter test results are inadmissible." ***Id.*** at 213.

The trial court denied the Appellant's challenge to the failure to the officer to convey the implied consent rights in Spanish based on the holding in the case of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

In ***Tosar***, the defendant did not understand the implied consent rights read to him because he understood very little English. ***Id.*** at 886. The trial court suppressed the results of the breath test after finding that the State had failed to meet its burden of properly informing the defendant of his implied consent rights. ***Id.*** In ***Tosar***, the Court of Appeals recognized that the officer failed to advise the suspect of his rights, but found that the failure was justified because, pursuant to O.C.G.A. §40-5-55(b) a non-English speaking driver, falls within a limited category of people deemed, as a matter of law, not to have revoked their implied consent because of 'a condition rendering [such person] incapable of refusal.'" ***Id.*** at 887.

The ***Tosar*** Court's attempt to equate a non-English speaking person with an unconscious person, is flawed because a non-English speaking person is certainly *capable* of understanding their implied consent rights, refusing to take the chemical test, or requesting an additional test ***when the implied consent rights are translated to them in their language***.

For instance, hearing impaired persons are similarly situated to non-English or language impaired persons in

so far as both are unable to understand the spoken language without translation. As discussed in more detail in the next section of this brief dealing with the equal protection challenge, the legislature has adopted special requirements for ***conveying*** through a qualified interpreter the implied consent rights to a hearing impaired person. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Thus, non-English or language impaired persons are not any more "incapable of refusing" than hearing impaired persons. Given the special rules controlling law enforcement officers communicating these same implied consent rights to hearing impaired persons, the legislature did not intent [sic] to lump all persons who are "incapable of comprehending [their] rights when read to [them]" into the category reserved for dead or unconscious persons.

This ***Tosar*** Court also reasoned that the non-English speaking or language impaired person's inability to communicate with the officer invoked the provisions of O.C.G.A. §40-6-392(a)(3), which provides:

> "The ***justifiable*** failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer."

(emphasis added) ***Id.*** at 888. The ***Tosar*** Court reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, ***any*** failure to obtain an additional test is justified and the results of the state-administered tests are admissible." (emphasis added) ***Id.*** While the statute refers to a "justifiable" failure, this Court created a blanket rule allowing "any" failure when it applied that statute to a non-English speaking person. This blanket rule is not

supported by the clear language of the statute which applies only to a "justifiable" failure.

Furthermore, in ***Tosar***, the Court of Appeals used an "exigent circumstances" rationale to support the new blanket rule. For instance, it reasoned that, as a matter of law, an "exigent circumstance" exception existed for language impaired or non-English speaking drivers based on the need to prevent destruction of evidence (which may occur by the dissipation of alcohol from a DUI suspect's blood while a warrant is obtained) ***while a foreign language translator was obtained***.

This "exigent circumstances" rationale is flawed for two reasons. First, the same rationale is not applied to hearing impaired persons who are guaranteed the right to a qualified interpreter despite the danger of destruction of evidence which may occur by the dissipation of alcohol while a translator is located. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Secondly, the "exigent circumstances" rationale assumes that obtaining a foreign language translation is impractical and time-consuming. In this case, the officer could have obtained a foreign language translation, and obtaining such a translation would have been both practical and readily available, as stipulated by the State. (R. at 237). Thus, the blanket rule in ***Tosar*** must be overruled or at least modified because its rationalizations and assumptions are inapplicable in this case, as applied to these facts.

At the time ***Tosar*** was decided, it may have been difficult or impractical to physically locate and obtain a foreign language translator to translate the implied consent rights in a timely manner. However, the same is

not true today, as the stipulated facts of this case clearly demonstrate.

Tosar was decided in 1986, before foreign language translation services became readily available to law enforcement officers. However, for the past decade, foreign language translation services have been ***instantly*** available to Cobb County police officers by simply using the nearest telephone. No delay in procuring a chemical sobriety test can now be asserted by the State as a constitutionally valid justification for a blanket denial of these rights.

In fact, in this case, the State stipulated to the fact that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the pre-paid services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing ***a toll free number***, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37).

The fact that the language line service is available to all officers as a pre-paid (subscribed) service, coupled with the knowledge of all three Cobb County police officers knew it was accessible to them by way of the nearest phone invokes a [sic] key questions: If you don't use the

service in situations like this, when would one use it? Is it to be used by police officers ONLY FOR CONFESSIONS?

It was further stipulated that telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the free business phones inside the Kroger store. (R. at 237). Finally, the parties stipulated that Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

Despite the fact that the translation services were readily available, the arresting officer made absolutely no effort to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero. (R. at 237). The officer made no such effort even though he had determined that Mr. Furcal-Peguero spoke only broken English, and that English was his second language. (R. at 235). The officer was also aware that Mr. Furcal-Peguero's performance on the field tests revealed that *he could not fully* ***comprehend*** *the instructions* of how to perform the evaluations, as given to him in English. (R. at 235).

Under the facts of this case, Mr. Furcal-Peguero did not fall under the category of "dead, unconscious, or otherwise incapable of refusal" pursuant to O.C.G.A. § 40-5-55(b). A language impaired or non-English speaking driver is capable of refusal and capable of understanding his implied consent rights when reasonable accommodations are made to obtain a translation of those rights., which in this case would mean a translation of Mr. Furcal-Peguero's implied consent rights into Spanish. Such reasonable accommodations are already required

for hearing impaired persons. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103.

It is also important to note that Mr. Furcal-Peguero was language impaired because of his race and national origin. Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236). His first and native language is Spanish. (R. at 236). On the night of his arrest, Mr. Furcal-Peguero had significant difficulty comprehending and speaking English. (R. at 237). In fact, his comprehension of English was "marginal." (R. at 237). In essence, Mr. Furcal-Peguero was not provided with an opportunity to understand his implied consent rights because of his race and nationality. There can be no justification for interpreting the statute in a manner which would discriminate against non-English speaking or language impaired persons on the basis of race or national origin. Yet, that is exactly the holding of the ***Tosar*** decision, which the police officer in the instant case relied upon in making no effort to obtain a Spanish translation of the implied consent warnings. (R. at 237).

Under the facts of this case, no "exigent circumstances" exception could exist because, even the State has agreed and stipulated that the translation was readily available and not impractical. Mr. Furcal-Peguero was effectively denied his opportunity to make a knowing and intelligent decision about whether to submit to the breath test and whether to request an additional chemical test.

Therefore, the Court of Appeals erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights. Furthermore, the Court of Appeals erred in dismissing Mr. Furcal-Peguero's argument that he did not ***knowingly*** waive his right to

additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was both practical and readily available.

Public policy in 2002, supports this Court's adopting Mr. Furcal-Peguero's position because as the State stipulated in this case, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). Undoubtedly, confessions are translated when the police determine the translation services are needed. The same public policy considerations mandate that Mr. Furcal-Peguero should have been provided with a Spanish translation of his implied consent rights before he was deemed to have waived his right to an independent chemical test. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services was unreasonable under the circumstances, rendering the results of the state administered chemical breath test inadmissible. Clearly this failure by the officer was not justified, "as applied" to the facts of this case.

WHEREFORE, based on the foregoing argument and citation of law, Petitioner requests that this Court should grant this petition for a writ of certiorari, and find that under the particular facts of this case, the officer's failure to make any attempt to obtain a readily available foreign translation of Mr. Furcal-Peguero's implied consent rights

was unjustified under the circumstances and requires the suppression of the breath results.

Respectfully submitted,

/s/ [Illegible]
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IN THE GEORGIA SUPREME COURT

RAFAEL ANTONIO FURCAL-PEGUERO,	:	
Appellant,	:	Court of Appeals Case No.: A02A0792
v.	:	
STATE OF GEORGIA,	:	
Appellee.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petitioner [sic] for a Writ of Certiorari upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: June 24, 2001

/s/ [Illegible]
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